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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-758

JOHN CHARLES GREEN,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINIONS BELOW

Petitioner was convicted of escape, Section 557.351, RSMo 1969, in the Circuit Court of Randolph County, Missouri. Judgment and sentence was entered by that court on September 8, 1969 (Petitioner's Appendix, p. 20a-23a). All proceedings in the Circuit Court of Randolph County, Missouri, are unreported.

On direct appeal to the Supreme Court of Missouri, petitioner's conviction was affirmed. That opinion is reported as *State* v. *Green*, 470 S.W.2d 567 (Mo. 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether the determination that petitioner's offer of proof in support of his proffered defense of necessity was insufficient to constitute a defense in his prosecution for escape, was in violation of any rights secured to him by the Constitution of the United States and the amendments thereto?

STATUTES INVOLVED

Section 557.351, RSMo 1969, provides:

"Any person sentenced to the state department of corrections upon conviction of escaping or attempting to escape from any state institution in which he was lawfully confined, or from the lawful custody of any person while being transported, shall be sentenced to the department of corrections generally for a term of not less than two and not exceeding five years."

STATEMENT OF THE CASE

On November 1, 1966, petitioner was convicted in the Circuit Court of Adair County, Missouri of the offense of burglary, and sentenced to confinement in the Department of Corrections for the State of Missouri for a period of three (3) years. Subsequently, on December 12, 1966, petitioner was assigned to the Missouri Training Center for Men at Moberly, Missouri. On December 16, 1966, petitioner Green appeared before the disciplinary board for fighting (Tr. 303-304, 370, 402, 448, 469).

On the evening of January 2, 1967, petitioner testified that he was sexually assaulted by two other inmates (Tr.

385, 388-390, 392). After the attack, he decided to go to the administrative personnel and tell them what had happened (Tr. 385). To do this, he decided to slash his arm (Tr. 385, 388, 392, 398, 450, 308). He was taken to the hospital at the institution (Tr. 308, 392, 394, 399). He did not report the sexual assault to the guards (Tr. 394), nor did he tell the doctor about the attack (Tr. 459-460). Petitioner confirmed that he never told anyone the names of his attackers (Tr. 355), and at the time of the evidentiary hearing, refused to give their names (Tr. 353). Petitioner testified that he subsequently told Hartness what had happened (Tr. 394), and indicated that he was told only to fight it out (Tr. 395).

Petitioner believes he was the victim of a second homosexual assault on January 14th or 15th (Tr. 404-439). On that occasion, two men picked the lock to his room (Tr. 404). He did not try to resist their entry (Tr. 404). He was knocked out (Tr. 405), and thinks he was sexually assaulted (Tr. 405). Once again, petitioner refused to divulge their names either at that time or at any subsequent time including the time of the evidentiary hearing (Tr. 456-458). Subsequent to this attack, he told the guards that he had swallowed glass (Tr. 305, 307, 407), and was taken to the hospital (Tr. 408). On January 16, 1967, he appeared before the disciplinary board because of his attempted suicide (Tr. 305, 316-317, 370, 402, 408, 417). As a result of his appearance before the disciplinary board, he was given a cell change (Tr. 306, 409).

After the cell change, there were no other sexual assaults upon petitioner (Tr. 459-463). Rather belatedly, petitioner did recall that a guard had propositioned him in March of 1967 (Tr. 415-416), however, when he told Captain Chapman about the matter, the guard was transferred (Tr. 416).

The incident which petitioner relies upon as necessitating and justifying his escape occurred at noon on April 14, 1967 (Tr. 421-422). Petitioner testified that several inmates threatened him with sexual assault that evening (Tr. 422, 427, 461); and that from the time of that threat, to the time of the escape at approximately 5:30 or 6:00 p.m. (Tr. 461), he did not contact a guard (Tr. 461), or anyone in authority (Tr. 461), nor did he ask anyone for assistance (Tr. 462).

Petitioner had not been subjected to any physical mistreatment by the prison officials (Tr. 434, 475-476), nor did he have any complaint about the facilities (Tr. 439). Petitioner confirmed that none of his privileges had been denied except those which are necessarily restricted for a short period of time because of disciplinary confinement (Tr. 434). He had access to the mail (Tr. 434), no limitations upon his visitors (Tr. 435), access to the inter-institutional mail (Tr. 435), and access to the officials for the purpose of making a complaint (Tr. 436).

ARGUMENT

I.

No Issue of Constitutional Significance Is Presented Because the Court Determined, on the Facts Presented, That the Petitioner's Offer of Proof in Support of His Proffered Defense of Necessity Was Insufficient, in Law and Fact, to Constitute a Defense to His Prosecution for Escape.

Contrary to petitioner's assertion, this case does not present an opportunity for the court to announce guidelines on the safety of prisoners, rights of prisoners to safely and adequately communicate with prison authorities, rights of prisoners to obtain a fair hearing before disciplinary boards, and to obtain access to the courts through

prison provided legal assistance for indigent and ignorant prisoners (Petition for Writ of Certiorari, page 9). This case does not provide any opportunity to broadly consider rules and regulations relating to inmates. Rather, this case presents the limited question as to whether petitioner's offer of proof in support of his proffered defense of necessity was sufficient, in law and fact, so as to constitute a submissible defense to his prosecution for escape.

It is beyond question that certain guarantees of the United States Constitution and the Amendments thereto, including the prohibition against cruel and unusual punishment, apply to prisoners incarcerated in penal institutions. *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Lee* v. *Washington*, 390 U.S. 333 (1968); *Cooper* v. *Pate*, 378 U.S. 546 (964). Although lawful incarceration may properly operate to deprive the inmate of certain rights which would attain to him otherwise. *Price* v. *Johnston*, 334 U.S. 266 (1948).

While the state may not subject any inmate to cruel and unusual punishment, the conditions as shown by petitioner's evidence do not constitute cruel and unusual punishment. While the state may not deny an inmate access to the courts, the circumstances as shown by petitioner's evidence do not demonstrate denial of access to the courts, and such question is not relevant to a determination of the sufficiency of his offered defense. The defense of necessity was not available to petitioner under the facts and circumstances here presented.

Unconstitutional conditions of confinement do not constitute either a defense or justification for an escape. *State* v. *Warren*, 4 N.C.App. 441, 166 S.E.2d 858 (1969). Necessity, as a defense, is not applicable to prosecutions for escape, and, even if applicable, is not supported by the

facts and circumstances here presented. *People* v. *Richards*, 269 Cal.App.2d 876, 75 Cal.Rep. 597 (1969).

Petitioner argues his confinement was unconstitutional because the state placed him in a position so as to be vulnerable to homosexual attacks. Petitioner's evidence is insufficient to establish the infliction of cruel and unusual punishment. Petitioner's evidence suggests that he was subjected to two attacks, which may or may not have been reported promptly and accurately to the prison officials (Tr. 321, 341-342, 347, 374-375, 379, 381-382). In any event, after the second alleged incident petitioner received a cell change and had no further difficuties until the afternoon of April 14, 1967. Thus, a period of three months transpired in which no assaults were made, nor did he make any complaint or have reason to make such complaint to prison officials. When the threat was made on the afternoon of April 14, 1967, petitioner did not inform any of the institution's personnel. In such a situation, it may not be concluded that the state inflicted cruel and unusual punishment on petitioner.

Deprivation of constitutional rights during imprisonment constitutes neither grounds for nor justification for an escape. *State* v. *Warren, supra*. The general state of the law has been summarized as:

> "Prisoners charged with escape have occasionally tried to justify the offense by claiming that the conditions of imprisonment were so intolerable that the confinement became unlawful, but this has not been recognized as a justification. . . ." 27 Am.Jur.2d, Escape, Prison Breaking and Rescue, Section 16, p. 858.

This is the rule which has been adopted in Missouri. As the Supreme Court of Missouri stated in *State* v. *King*, 372 S.W.2d 857, 859 (Mo. 1963):

". . . an attempt to escape is not justifiable 'because the conditions of imprisonment were intolerable or inhumane.'. . ."

Other decisions in Missouri reflect the application of this principle. *State* v. *Pace*, 402 S.W.2d 351 (Mo. 1966); *State* v. *Hart*, 411 S.W.2d 143 (Mo. 1967); *State* v. *Croney*, 425 S.W.2d 65 (Mo. 1968); *State* v. *Rentschler*, 444 S.W.2d 453 (Mo. 1969).

The same position has been adopted by other courts which have considered the issue. *People* v. *Whipple*, 100 Cal.App. 261, 279 P. 1008 (1929); *State* v. *Palmer*, 45 Del. 308, 72 A.2d 442 (1950); *Johnson* v. *State*, 122 Ga. 172, 50 S.E. 65 (1905); *State* v. *Cahill*, 196 Iowa 486, 194 N.W. 191 (1923); *Hinkle* v. *Commonwealth*, 23 Ky.L.R. 1988, 66 S.W. 816 (1902); *State* v. *Davis*, 14 Nev. 439, 33 Am.Rep. 563 (1880); Anno: What justifies escape or attempt to escape, or assistance in that regard, 70 A.L.R.2d 1430, Section 13.

A similar factual situation was presented in *People* v. *Richards, supra*. In that case:

". . . He (defendant) contends that the trial court committed prejudicial error in refusing to receive evidence, embodied in an offer of proof, on a proposed defense of coercion and duress as justification for the offense charged, and in refusing to give proffered instructions on the same issue. These points are examined and found wanting. The judgment must be affirmed." 75 Cal.Rep. at 598.

The court, in describing the nature of the offer of proof, stated it to be:

". . . He represented to the court that acts of sodomy had been inflicted on the defendant, that the defendant did snitch, that threats were made upon his life,

that the guards would do nothing, and that defendant had exhausted every possible remedy short of escape to avoid the threat of death. . . . In response to the court's invitation to make an offer of proof, the defendant represented that inmate Joel Blume would testify 'that inmates told him to remain away from the defendant * * * because Wayne Richards was going * * * to be killed * * * so keep his distance away from him or he would be killed too.' Defendant himself would testify that 'he was told by Mr. Blume who confided in him that he was marked to be killed or seriously injured and that the defendant understood this was going to be imminent, immediate, or as soon as possible and he felt he had two possibilities, one to go to the guards, something that he's tried in the past and the guards have only responded by telling him to punch someone in the mouth or to commit probably a worse crime than escape, and, number two, to remove himself from the threats; and the only other way to remove himself from the threat is to remove himself from the imprisonment, the prison itself; and for this reason the defendant took the only alternative that he saw.'" 75 Cal.Rep. at 599-600.

A similar result was reached in *People* v. *Noble*, 18 Mich.App. 300, 170 N.W.2d 916 (1969). The court there held that it was not a defense to a prosecution for escape that the defendant fled his place of confinement to avoid homosexual attacks by other prisoners. The court in resolving the issue adversely to the appellant therein stated:

"Finally, defendant protests that he only fled the prison work camp in desperation to avoid homosexual attacks by other prisoners. The problem of homosexuality in the prisons is serious and perplexing, and

> never more so than in a case such as this where such activity is forced upon a young man against his will. However, the answer to the problem is not the judicial sanctioning of escapes. While we have no reason to doubt the sincerity of this defendant, it is easy to visualize a rash of escapes, all rationalized by unverifiable tales of sexual assaults. The solution must rather come from some kind of penological reform." 170 N.W.2d at 918.

Petitioner has not demonstrated that under the facts he is entitled to rely upon the defense of necessity. The Missouri rule, reaffirmed in the present decision, is set forth in *State* v. *St. Clair*, 262 S.W.2d 25 (Mo. 1953), when the court stated:

> ". . . But, to constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Further future injury is not enough. Nor can one who has a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily injury invoke the doctrine as an excuse. . . ." 262 S.W.2d at 27-28.

In this case, as the Circuit Court and the Supreme Court of Missouri found, the evidence demonstrates that the act threatened was not present, imminent, and of such a nature as to indicate that there was not a reasonable opportunity to avoid doing the act, i.e., the escape.

Therefore, this case is not in conflict with decisions of this court, and does not present constitutional questions, because the single issue is whether petitioner's offer of proof in support of his proffered defense of necessity was insufficient, in law and fact, to constitute a defense to his prosecution for escape.

CONCLUSION

Because the decision of the Supreme Court of Missouri was correct; and because there is no conflict between the decision of the Supreme Court of Missouri and the decisions of this court; and because the case does not present a constitutional question, we submit the petition for writ of certiorari should be denied.

Respectfully submitted,

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